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No. 90-1902

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1990

EASTERN AIR LINES, INC.,
*Petitioner,*
vs.
AIR LINE PILOTS ASSOCIATION, INTERNATIONAL and
EASTERN AIR LINES MASTER EXECUTIVE COUNCIL,
*Respondents.*

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT**

## MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICI CURIAE AIR TRANSPORT ASSOCIATION OF AMERICA AND OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF EASTERN AIR LINES, INC.

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The Air Transport Association of America (the "Association") and Official Committee of Unsecured Creditors of Eastern Air Lines, Inc. (the "Committee") move the Court for leave to file the attached brief of amici curiae in support of the Petition for Writ of Certiorari. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the respondents was requested but refused.

I

## NATURE OF THE INTEREST OF THE ASSOCIATION AND THE COMMITTEE

The Association was founded in 1936. It is a non-profit, unincorporated association of federally certificated air carriers providing scheduled and charter passenger and cargo service. The Association's 20 operator members account for more than 97% of the passenger and cargo traffic flown annually in the United States.[1]

Many of the members of the Association are parties to collective bargaining agreements with labor unions. It is crucial to the Association's members that courts uphold an employer's right to operate its business during an economic strike by hiring permanent replacements. An essential part of this right is the employer's ability to refuse to fire the permanent replacements to make room for returning strikers. If this right is not enforced by the courts, employers will effectively lose the ability to operate during a strike by hiring permanent replacements for the strikers.[2]

The Committee represents all of the general unsecured creditors of Eastern Air Lines, Inc. ("Eastern"). Eastern

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[1]Operator members authorizing this brief are: Alaska Airlines, Inc., Aloha Airlines, Inc., American Airlines, Inc., American Trans Air, Inc., Continental Airlines, Inc., DHL Airlines, Eastern Air Lines, Inc., Hawaiian Airlines, Midway Airlines, Inc., Pan American World Airways, Inc., Southwest Airlines, Trans World Airlines, Inc., The Trump Shuttle, United Parcel Service, and USAir, Inc.

[2]In the interest of its members, the Association has filed numerous *amicus* briefs in other cases before this Court which involve employment law issues. These include: *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29 (1987); *Dep't of Transportation v. Paralyzed Veterans of America*, 477 U.S. 597 (1986).

filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code on March 9, 1989. On March 22, 1989, the Committee was appointed by the United States trustee for the Southern District of New York. The unsecured creditors represented by the Committee include, among others, former employees, the Pension Benefit Guaranty Corporation, trade creditors, debenture holders, and aircraft and engine manufacturers, holding claims aggregating in excess of $2.3 billion. Should the decision below be permitted to stand, Eastern's estate could be subject to potential additional claims of approximately $75 million, representing claims for backpay and benefits allegedly owed to the striking pilots. The respondents assert that these claims arose during the course of the administration of Eastern's Chapter 11 estate and therefore have priority over the claims of the unsecured creditors represented by the Committee, *see* 11 U.S.C. § 503(b)(1). Thus, the Committee has a significant interest in requesting this Court to correct the erroneous decision below.

## II

## ISSUES TO BE ADDRESSED BY THE AMICI CURIAE

The decision below bears significantly on an airline's right to carry on its business in the face of a crippling pilots' sympathy strike. The decision below impermissibly restricts this right by holding that Eastern was required to reinstate returning strikers, notwithstanding its preexisting commitment of permanent employment to replacement pilots who were still in training when the strike ended. The amici curiae brief addresses the conflict

among the circuit courts of appeals on this issue, examines the failure of the court below to adhere to this Court's authority, discusses the national importance and practical effect of the rule adopted by the Eleventh Circuit Court of Appeals, and deals with the manner in which that rule frustrates the purposes of the Bankruptcy Code.

For the foregoing reasons, the Court should grant this Motion for Leave to File Brief of Amici Curiae in Support of Petition for Writ of Certiorari.

Dated: August 13, 1991.

Respectfully submitted,

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## BRIEF OF AMICI CURIAE, AIR TRANSPORT ASSOCIATION OF AMERICA AND OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF EASTERN AIR LINES, INC., IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

## DESCRIPTION OF INTEREST OF AMICI CURIAE

The Air Transport Association of America (the "Association") and Official Committee of Unsecured Creditors of Eastern Air Lines, Inc. (the "Committee") adopt the statement made in the Motion for Leave to File Brief, immediately preceding this brief, as the description of the interest of amici curiae. In addition, amici curiae submit that the decision below poses a fundamental threat to an important principle of federal labor policy: the right of an employer to permanently replace strikers during an economic strike. This principle is especially important to commercial air carriers, who are charged, under the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* ("RLA"), with the duty to avoid unnecessary interruptions in the free flow of airline passengers and freight throughout the nation.

In a 2-1 decision, the Eleventh Circuit held that, following the end of an eight-month sympathy strike called by respondent Air Line Pilots Association, International ("ALPA"), replacement pilots who had been hired by petitioner Eastern Air Lines, Inc. ("Eastern"), and who were undergoing an extensive, job-specific training program mandated by Federal Aviation Administration ("FAA") regulations, were not to be accorded "permanent replacement" status. This decision is in conflict with the Fifth Circuit, which follows the "offer and acceptance" rule developed by the National Labor Relations Board ("NLRB") in analogous cases arising under the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* ("NLRA"). Under the "offer and acceptance" rule, the employer is not required to reinstate returning strikers if the employer has made a firm commitment of permanent employment to their replacements, even if the replacements have not yet commenced work due to training requirements or other contingencies. The court below

ignored the "offer and acceptance" rule, thereby creating a split among the circuits on a legal issue which is important to all RLA employers.

The decision below also violates this Court's holdings that an RLA employer's right to self-help is broader than that which would be available under the NLRA. Despite this Court's holdings on this point, the Eleventh Circuit's majority opinion sharply limits an RLA employer's ability to carry on its business during a strike. By holding that the RLA employer must reinstate returning strikers, even if this would require the RLA employer to breach promises of permanent employment to the replacements, the decision effectively deters RLA employers from offering permanent employment to replacement workers who must undergo a lengthy period of job-specific training. The decision also may deter replacements from leaving their present jobs and accepting an offer of permanent employment if made, since the Eleventh Circuit's decision requires the employer to displace the replacements with returning strikers if the replacements are still in training when the strike ends. If the employer cannot hire sufficient numbers of temporary replacements to operate the business during a strike, as is undisputed in this case, the RLA employer would have little choice but to cease operations during the strike. This is contrary not only to federal labor policy, but also to the fundamental policy of the Bankruptcy Code, which is to permit the rehabilitation of the debtor and continuance of the business as a viable going concern. Certiorari should be granted to correct the decision below, which impermissibly restricts an RLA employer's right to use self-help to operate its business during a strike.

## CONSENT OF PARTIES

Respondents to this action refused consent to the filing of this brief by the Association and the Committee. A motion for leave to file this brief is attached. Petitioner has consented to the filing of this brief and written consent is filed concurrently herewith.

## STATEMENT OF THE CASE

The Association and the Committee adopt the Statement of the Case set forth in the Petition for Writ of Certiorari, as well as Petitioner's description of the Opinions Below, Jurisdiction, Statute Involved, and Question Presented.

## REASONS FOR GRANTING THE WRIT

### I.

### REVIEW IS NEEDED TO RESOLVE THE CONFLICT BETWEEN THE CIRCUITS ON WHETHER THE NLRB'S "OFFER AND ACCEPTANCE" TEST, WHICH PERMITS THE EMPLOYER TO REFUSE TO REINSTATE STRIKERS WHEN PERMANENT REPLACEMENTS HAVE BEEN HIRED BUT NOT YET COMMENCED WORK, SHOULD BE APPLIED IN CASES ARISING UNDER THE RLA.

This Court has long recognized that an employer has the right to take such actions which are required "to protect and continue his business" during an economic strike.[1] *NLRB v. Mackay Radio & Telegraph Co.*, 304 U.S.

[1] This Court has reaffirmed *Mackay Radio* on several occasions. *See NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 232 (1963) ("We have no intention of questioning the continuing vitality of the *Mackay*

333, 345 (1938). This includes the right "to replace the striking employees with others in an effort to carry on the business." *Id.* Upon the conclusion of the strike, the employer "is not bound to discharge those hired to fill the places of strikers," *id.*, but instead may honor its commitment of permanent employment to the replacement workers. Otherwise, it would be virtually impossible in many strikes to induce replacement workers to leave their existing jobs and work during the strike. *See Belknap, Inc. v. Hale*, 463 U.S. 491, 519 (1983) (Blackmun, J., concurring) ("The employer makes offers of permanent employment to induce replacement workers to take jobs.").

The *Mackay Radio* rule applies to cases, such as this, which arise under the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.* ("RLA"). *See Trans World Airlines, Inc. v. Flight Attendants*, 489 U.S. 426, 433-34 (1989). In the decision below, the Eleventh Circuit acknowledged that *Mackay Radio* defined Eastern's right to hire permanent replacements during ALPA's sympathy strike. The court erred, however, in holding that *Mackay Radio* did not apply to replacement pilots who had been hired during the strike but were still in training when the strike ended. It is undisputed that Eastern had promised permanent employment to all of these replacement pilots many months before the strike ended, contingent only upon their successful completion of Eastern's FAA-mandated, carrier-specific, pilot training program. Thus, the Eleventh Circuit's decision improperly required Eastern to displace the replacement pilots with returning strikers, in direct contradiction of *Mackay Radio* and subsequent decisions. *Mackay Radio*, 304 U.S. at 347 ("the [em-

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rule"); *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 379 (1967); *Belknap, Inc. v. Hale*, 463 U.S. 491, 504 n.8 (1983); *Trans World Airlines, Inc. v. Flight Attendants*, 489 U.S. 426, 433-34 (1989).

ployer] was not bound to displace men hired to take the strikers' places in order to provide positions for them").

For the past 53 years, *Mackay Radio* has provided a stable rule that governs an employer's right of self-help during an economic strike: the employer is free to make and keep commitments of permanent employment to the workers who are hired to replace the strikers. In applying this rule to cases governed by the National Labor Relations Act, 29 U.S.C. §§ 151 *et seq.* ("NLRA"), both the National Labor Relations Board ("NLRB") and the courts have repeatedly held that an employer may refuse to reinstate strikers if this would require the displacement of replacement workers who have accepted offers of permanent employment, even if the replacements have not yet started working when the strikers unconditionally offer to return to work. This issue arises in a variety of factual settings, including cases where (1) employer personnel policies require a training or probationary period before an employee becomes "permanent";[2] (2) the job offer is contingent upon passing various posthire tests or examinations;[3] (3) the replacement requests a delay in

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[2] *E.g., Anderson, Clayton & Co., Inc.*, 120 N.L.R.B. 1208 (1958) (new hires required 1-4 months of training and were subject to a 6 month probationary period); *Kurz-Kasch, Inc.*, 286 N.L.R.B. 1343 (1987), *enf. denied on other grounds*, 865 F.2d 757 (6th Cir. 1989) (replacements did not begin work until one month after strike ended due to need to train them); *C.H. Guenther & Son, Inc.*, 174 N.L.R.B. 1202, 1212 (1969), *enf'd*, 427 F.2d 983 (5th Cir.), *cert. denied*, 400 U.S. 942 (1970) (replacements required to serve a "training or probationary period" of 30 or 60 days); *Hot Shoppes, Inc.*, 146 N.L.R.B. 802, 804 (1964) (fact that replacements "required some training" irrelevant to whether employer intended that they permanently replace strikers).

[3] *E.g., Solar Turbines, Inc.*, 302 N.L.R.B. No. 3 (1991) (job offers contingent upon passing drug and alcohol test); *Transport Service*

starting work for his or her own convenience;[4] and (4) the employer requests replacements from a union hiring hall for strikers who refuse to cross an unauthorized picket line.[5] Under all of these circumstances, the Board and the courts have held that the employer was not required to reinstate returning strikers because the replacements had already been offered, and accepted, permanent employment.[6]

In stark contrast to the Eleventh Circuit's majority opinion in this case, *no* NLRA decision has ever held that an employer must reinstate returning strikers after their

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*Co.*, 302 N.L.R.B. No. 4 (1991) (job offers contingent upon passing a physical exam, polygraph test, and motor vehicle records check).

[4]*E.g., International Association of Machinists v. International Aircraft Services, Inc.*, 302 F.2d 808, 810 (4th Cir. 1962) (replacements lived out of state when hired and needed time to relocate before starting work); *H. & F. Binch Co.*, 188 N.L.R.B. 720 (1971), *enf'd*, 456 F.2d 357 (2d Cir. 1972) (replacement needed time to arrange for babysitter); *Southwest Engraving Co.*, 198 N.L.R.B. 694 (1972) (replacement did not start work until husband commenced position as supervisor for same employer).

[5]*E.g., Newbery Energy Corp.*, 227 N.L.R.B. 436 (1976) (employer obtained replacements from IBEW hiring hall after employees refused to cross Teamsters picket line that IBEW did not respect).

[6]Consistent with the NLRB rule, this Court recognized, in *Belknap, Inc. v. Hale*, 463 U.S. at 504 n.8, that "[t]he refusal to fire permanent replacements *because of commitments made to them* in the course of an economic strike satisfies the requirement . . . that the employer have a 'legitimate and substantial justification' for its refusal to reinstate strikers." (Emphasis added.) In other words, it is the employer's commitment to provide a permanent job that is important, not whether the replacement has actually reported to work or is in a "productive" rather than "training" or "probationary" status. All jobs require some degree of training, which is a fact recognized by the NLRB and the courts in NLRA cases, but completely ignored by the Eleventh Circuit in the decision below.

permanent replacements have accepted binding offers of employment.[7] Instead, decisions under the NLRA uniformly recognize that the employer is "free to make and keep" its "solemn promises of permanent employment" to the replacement workers. *See Belknap, Inc. v. Hale*, 463 U.S. at 506. Indeed, for the employer to reinstate strikers and breach a promise of permanent employment to the replacements may give rise to liability for breach of contract to the replacement workers. *Id.* Rather than discuss or analyze these principles, however, the Eleventh Circuit simply declared, in a footnote, that NLRA cases were irrelevant. 920 F.2d at 725 n.3.

In contrast to the Eleventh Circuit's decision, the Fifth Circuit follows the "offer and acceptance" rule to determine whether an RLA employer may decline to reinstate strikers due to its preexisting commitments to the permanent replacements. In *National Airlines, Inc. v. International Association of Machinists*, 416 F.2d 998 (5th Cir. 1969) ("*National I*"), the Fifth Circuit held that *Mackay* defines an employer's right to permanently replace strikers under the RLA, as well as the NLRA.[8] *Id.* at 1006. Subsequently, in *National Airlines, Inc. v. International*

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[7]The only RLA decision to depart from the "offer and acceptance" rule is *Independent Federation of Flight Attendants v. Trans World Airlines, Inc.*, 819 F.2d 839 (8th Cir. 1987), *cert. granted in part and denied in part*, 485 U.S. 958 (1988), *rev'd on other grounds*, 489 U.S. 426 (1989). There, the Eighth Circuit concluded that flight attendant trainees were not "permanent replacements" until the completion of their training. As discussed *infra*, the Eighth Circuit's analysis is erroneous, since the court confused the issue of whether the replacements were RLA "employees" with the question of whether the employer properly engaged in self-help by hiring permanent replacements.

[8]This court cited *National I*, with approval, for this proposition in *Trans World Airlines, Inc. v. Flight Attendants*, 489 U.S. at 433.

*Association of Machinists*, 430 F.2d 957 (5th Cir. 1970), *cert. denied*, 400 U.S. 992 (1971) ("*National II*"), the Fifth Circuit specifically applied the "offer and acceptance" rule to hold that an RLA employer could honor its commitment to permanent replacements so long as a binding offer of employment had been accepted by the replacements.[9] 430 F.2d at 961. As stated in *National II*, "if an employer has the intention to bind itself to a firm contract of employment, and the employee has accepted a specific job assignment, the replacement is 'hired' even though subsequently he may be divested of the job for failure to pass medical or security clearance." *Id. National II* cites NLRA cases in support of this rule, and correctly concluded that there is no reason to restrict an RLA employer's right of self-help to anything less than that available under the NLRA. *See Trans World Airlines, Inc. v. Flight Attendants*, 489 U.S. 426, 439-40 (1989) (RLA employer's right of self-help during a strike is greater than would be available under the NLRA).

In contrast to *National II*, the Eleventh Circuit majority did not look to any NLRA cases for guidance on the question of whether Eastern's promise of permanent employment should be respected.[10] Even more troubling is the majority opinion's failure to analyze the substantive

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[9] *Accord, Air Line Pilots Ass'n v. United Air Lines, Inc.*, 616 F. Supp. 849, 851 (N.D. Ill. 1985) ("Permanent replacements hired from outside the company . . . need not actually begin working in order to retain their jobs following the conclusion of a strike"), *rev'd on other grounds*, 802 F.2d 886 (7th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987).

[10] In his dissent, Judge Anderson concluded that *National II* governed this case and compelled the conclusion that Eastern lawfully refused to reinstate the strikers due to its preexisting commitment of permanent employment to the replacements. 920 F.2d at 731.

provisions of the RLA which Eastern allegedly violated by honoring its promise of permanent employment to the replacement pilots. ALPA's cross-complaint asserts that Eastern's refusal to reinstate the striking pilots violated Sections 2, Third and 2, Fourth of the RLA, 45 U.S.C. §§ 152, Third, 152, Fourth, but neither the district court nor the Eleventh Circuit majority opinion even discussed these provisions. Rather than analyze these RLA provisions, the Eleventh Circuit simply declared that an RLA employer's refusal to reinstate strikers could be an "unfair labor practice." 920 F.2d at 725.[11]

Instead of analyzing the substantive provisions of the RLA, the Eleventh Circuit majority discussed only whether the replacement pilots fell within the RLA's definition of an "employee."[12] 920 F.2d at 726. This is irrelevant, however, to the question of whether Eastern properly engaged in self-help by offering permanent employment to the replacement pilots. The issue of whether a replacement worker is an RLA "employee" has been litigated in cases where the replacement sues the carrier for allegedly violating the replacement's Section 2 rights. *E.g., Air Line Pilots Ass'n v. United Air Lines, Inc.*, 802 F.2d 886, 910 (7th Cir. 1986), *cert. denied*, 480 U.S. 946 (1987) (trainees who had not yet commenced active duty

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[11]The RLA does not enumerate any "unfair labor practices." Instead, "unfair labor practices" are defined in Section 8 of the NLRA, 29 U.S.C. § 158.

[12]The RLA defines an "employee" as:

> "every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect . . . ." 45 U.S.C. § 151, Fifth.

were not RLA "employees" entitled to Section 2 rights).[13] The issue is pertinent there because Sections 2, Third and 2, Fourth grant rights only to "employees" within the definition of RLA Section 1, Fifth, 45 U.S.C. § 151, Fifth. Here, however, it is the strikers, rather than their replacements, who claim a violation of Sections 2, Third and 2, Fourth. The question of whether the replacements are RLA "employees" is not pertinent — instead, the relevant issue (which was never acknowledged by either the district court or the Eleventh Circuit) is whether Eastern violated Sections 2, Third and 2, Fourth, by refusing to reinstate the strikers.[14]

The Eleventh Circuit's majority opinion is also unsupported by the decisions of this Court. This Court has never based an employer's right of self-help on whether

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[13]The Eighth Circuit decision in *Independent Federation of Flight Attendants v. Trans World Airlines, Inc.*, 819 F.2d 839 (8th Cir. 1987), *cert. granted in part and denied in part*, 485 U.S. 958 (1988), *rev'd on other grounds*, 489 U.S. 426 (1989), incorrectly relied upon *United Air Lines* to hold that the employer's right to permanently replace depended upon whether the replacements were RLA "employees." Significantly, the Eighth Circuit's analysis failed to identify any provision of the RLA that had been violated by TWA's refusal to reinstate the returning strikers, and thus suffers the same analytical flaw as the Eleventh Circuit's majority opinion in this case.

[14]There is nothing in the record below that could support a finding that Eastern violated either statutory provision. Section 2, Third, 45 U.S.C. § 152, Third, prohibits employers from interfering, influencing, or coercing employees in the designation of employee representatives. Section 2, Fourth, 45 U.S.C. § 152, Fourth, provides that employees have the right to organize and bargain collectively without employer interference. Both provisions "address[] primarily the precertification rights and freedoms of unorganized employees," *TWA*, 489 U.S. at 440, and do not imply any limitation upon an employer's right of self-help when responding to a union's strike. *Id.* at 442.

the permanent replacement is a statutory "employee" under either the RLA or the NLRA. Instead, the Court has always examined whether an employer has "legitimate and substantial business justifications" for refusing to reinstate returning strikers. *NLRB v. Fleetwood Trailer Co.*, 389 U.S. 375, 378 (1967). Such business justifications often take forms which are unrelated to hiring statutory employees, such as subcontracting work,[15] discontinuing certain types of work, or assigning supervisors to perform bargaining unit work. Thus, asking whether pilot trainees have achieved RLA "employee" status begs the question — the relevant issue is whether the employer's promise of permanent employment to the replacements, contingent upon the successful completion of training, is a valid business justification for refusing to reinstate the returning strikers.[16] The Eleventh Circuit's decision is erroneous, and should be reviewed by this Court to resolve the conflict among the Circuits.

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[15] *E.g., Elliot River Tours*, 246 N.L.R.B. 935 (1979) (2-year subcontract of bargaining unit work lawful response to strike threat).

[16] The NLRB recently rejected the argument that the replacement's "employee" status was relevant to the employer's right to replace in *Solar Turbines, Inc.*, 302 N.L.R.B. No. 3 (1991). There, the union argued that returning strikers should displace newly hired replacements, since the new hires who had not yet passed a drug/alcohol test were not yet statutory "employees" under the NLRA. The Board acknowledged that although "employee" status was relevant for certain purposes, such as defining the employer's collective bargaining obligation, it was irrelevant to whether the replacements had to be fired to make room for returning strikers. Instead, the only relevant issue was whether the replacements had accepted an offer of employment, conditioned upon passing the drug/alcohol test. *Id.*, slip op. at 3-4 n.3. Here too, whether the pilots were statutory RLA "employees" during their training period is simply not relevant to the question of whether Eastern engaged in lawful self-help by honoring its commitment of permanent employment to the replacement pilots.

## II.

## THE DECISION BELOW IS CONTRARY TO THE DECISIONS OF THIS COURT WHICH GIVE RLA EMPLOYERS A BROADER RANGE OF SELF-HELP THAN WOULD BE AVAILABLE UNDER THE NLRA.

This Court has repeatedly recognized that, once the RLA's procedures for resolving a major dispute are exhausted, the parties may "employ the full range of whatever peaceful economic power they can muster . . . ." *Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 392 (1969). In *Jacksonville Terminal*, it was the employer which attempted to enjoin the union's attempt to engage in self-help by secondary picketing. This Court declined to incorporate into the RLA any restrictions on secondary picketing that had been developed under the NLRA due to the absence of detailed legislative standards or an administrative agency (such as the NLRB) charged with statutory enforcement of the RLA. Instead, the Court held that both unions and employers are free to enjoy the "full range" of self-help following exhaustion of the RLA's conciliation procedures. *Id.* at 392-93. *Accord, Burlington Northern R. Co. v. Brotherhood of Maintenance of Way Employes*, 481 U.S. 429 (1987); *Pan American World Airways, Inc. v. International Brotherhood of Teamsters*, 894 F.2d 36 (2d Cir. 1990).

Most recently, in *Trans World Airlines, Inc. v. Flight Attendants*, 489 U.S. 426 (1989), this Court reviewed its prior decisions and concluded that they "have read the RLA to provide greater avenues of self-help to parties that have exhausted the statute's 'virtually endless' . . . dispute resolution mechanisms than would be available under the NLRA." *Id.* at 439 (emphasis added). In *TWA*, flight attendants who crossed a picket line and worked

during a strike were permitted to bid for, and retain after the strike, preferred assignments that were normally held by more senior striking flight attendants. This Court held that TWA's policy was a lawful means of self-help. In reaching this conclusion, this Court specifically rejected the union's argument that an RLA employer's right to self-help is more limited than under the NLRA:

> "[Prior cases] provide the backdrop for the Union's contention that, in this case, we should understand provisions of the RLA to *limit* 'the full range of whatever peaceful economic power [the parties] can muster,' *beyond* the limitations even imposed by the NRLA. This we decline to do." *Id.* at 439-40 (citations omitted, emphasis in original).

Because RLA employers are entitled to "greater avenues of self-help . . . than would be available under the NLRA," *TWA*, 489 U.S. at 439, an employer such as Eastern is entitled to at least the same, if not more, latitude in honoring its commitments to permanent replacements than is granted to NLRA employers. Since the NLRA cases uniformly permit employers to honor promises of permanent employment to replacements who are still in training (or who have not yet started work for any number of other reasons), Eastern should not be penalized for taking the same measure of self-help. Instead, Eastern merely honored its "solemn promises of permanent employment" to the replacement pilots, *Belknap, supra*, 463 U.S. at 506, as permitted by the decisions of this Court.

## III.

## THE DECISION BELOW RAISES POLICY ISSUES OF NATIONAL IMPORTANCE REGARDING CONSISTENT APPLICATION OF THE RAILWAY LABOR ACT AND THE FULFILLMENT OF THE OBJECTIVES OF THE BANKRUPTCY CODE.

In addition to creating conflict with the Fifth Circuit, and ignoring this Court's holdings that the right to self-help under the RLA is broader than under the NLRA, the Eleventh Circuit's majority opinion also raises two public policy issues of national importance. First, the decision conflicts with the RLA's objective of avoiding interruptions to commerce and the operation of air and rail carriers. Second, the decision ignores the fundamental policy of the Bankruptcy Code, which is intended to provide troubled companies with relief from creditors and provide an opportunity for rehabilitation of the business. The decision below would undercut both of these key policies by making it extraordinarily difficult for many RLA employers to continue their operations during a strike, thus leading to disruptions in commerce and, in cases where carriers are operating under the protection of the Bankruptcy Code, greater risks that the carrier will not be rehabilitated.

This Court has recognized that, during a strike, RLA employers must be able to engage in self-help to avoid interruptions in the operation of air and rail carriers. *See Burlington Northern, supra*, 481 U.S. at 451-52 ("the availability of . . . self-help measures . . . may increase the effectiveness of the RLA in settling major disputes by creating an incentive for the parties to settle. . . ."); *Brotherhood of Railway & Steamship Clerks v. Florida East Coast Railway Co.*, 384 U.S. 238, 244 (1966) ("The carrier's right of self-help is underlined by the public service

aspects of its business."). Here, Eastern's decision to hire replacement pilots was essential to its effort to rebuild its operations following ALPA's sympathy strike.[17] The record below shows that Eastern could not have recruited sufficient numbers of replacement pilots without the promise of permanent employment; indeed, Eastern submitted 70 declarations from replacement pilots stating that they would not have come to work for Eastern absent a promise of permanent employment. (Eastern's Petition at 4.) Thus, that promise of permanent employment was an essential element of Eastern's ability to effectively engage in self-help.

It is especially critical to commercial air carriers that they not be required to reinstate returning strikers while their replacements are still in training. Under FAA regulations, all pilots must undergo a lengthy period of carrier-specific training. Even experienced pilots who have flown similar types of aircraft for other large carriers must undergo extensive, carrier-specific training before being allowed to operate aircraft for their new employer. Moreover, pilots on active duty must comply with the FAA's "recent experience" requirement of three takeoffs and landings within the 90-day period preceding any

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[17]Although the record amply demonstrates the business necessity of Eastern's decision to hire permanent replacements, Eastern had no burden to make such a showing. Instead, the "business necessity" of a decision to hire permanent replacements is presumed. *See Flight Attendants v. Trans World Airlines, Inc.*, 132 L.R.R.M. [BNA] 2422, 2423 (W.D. Mo. 1989) ("[I]t would seem that the existence of a strike and the use by the employer of a promise of permanent tenure are the only factual matters that need be established to show business justification" for refusing to reinstate strikers); *accord, Belknap, Inc. v. Hale*, 463 U.S. 491, 504 n.8 (1983); *Hot Shoppes, Inc.*, 146 N.L.R.B. 802, 805 (1964).

flight, as well as periodic proficiency checks. 14 C.F.R. §§ 121.439-.441 (1990).

In light of these FAA requirements, the Eleventh Circuit's majority decision would gravely limit an air carrier's ability to use self-help to operate during a strike. Replacement pilots would no longer be able to rely upon the employer's promise of permanent employment, since that promise would be meaningless if the strikers offer to return to work while the replacements are still in training. Moreover, labor unions representing pilots would be granted extraordinary bargaining power in comparison to other labor unions. Under the Eleventh Circuit majority opinion, a pilots' union could continue a strike up to the time when replacement pilots were about to complete a lengthy and costly training program, and the strikers would still be assured immediate reinstatement if they offered to return to active duty at that time.

The majority opinion of the Eleventh Circuit, if permitted to stand, would have very serious adverse effects on airline employers. It would be unfair to employers who have made legally binding promises of permanent employment to the replacement pilots. If the strikers are reinstated and displace the replacements, then the employer faces liability for breach of contract to the replacements. On the other hand, if the employer honors its commitment to the replacements and refuses to reinstate the strikers, it faces liability to the strikers under the Eleventh Circuit's reasoning. The only alternative to this dilemma would be to continue to employ both the strikers and the replacements, even though this would generally result in costly and inefficient overstaffing. Faced with these alternatives, many RLA employers would probably refrain from hiring permanent replacements, even though it may be virtually impossible for some carriers (as it was for

Eastern) to attract sufficient numbers of temporary replacements to continue operations. In many cases the employer would simply elect to cease operations during a strike due to the excessive costs, and potential liabilities, of hiring permanent replacements, thereby losing its ability to provide air service to the public.

The Eleventh Circuit's decision also runs contrary to the fundamental policy of the Bankruptcy Code. The Bankruptcy Code is intended to provide troubled companies with a "breathing spell" from their creditors, and to permit the business to be rehabilitated for the benefit of all interested parties, including creditors, equity holders, and the debtor's employees. *See* H. Rep. No. 595, 95th Cong., 1st Sess. 340 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 49 (1978). Contrary to this basic policy, the Eleventh Circuit decision makes it much more difficult for a struggling employer operating under Chapter 11 of the Bankruptcy Code to reorganize when faced with a strike. If a carrier operating under the Bankruptcy Code refrains from hiring permanent replacements due to the Eleventh Circuit's decision, then it significantly reduces the likelihood that it will be able to operate, and successfully reorganize, during a strike. This is a very real problem in the airline industry, where four domestic carriers are currently operating under the protection of the Bankruptcy Code.[18] When the employer is in bankruptcy, the principles underlying the Bankruptcy Code suggest that greater self-help should be permitted in order to increase the likelihood of rehabilitating the debtor.

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[18] America West Airlines; Continental Airlines; Midway Airlines; and Pan American World Airways. In addition, Trans World Airlines has publicly announced its intention to file a petition for reorganization.

Finally, the Eleventh Circuit's majority opinion might create, rather than avoid, additional disruption of airline operations in the aftermath of a strike. Following a lengthy strike, the returning strikers might not be able to immediately resume work due to the FAA "recent experience" requirements. Instead, the strikers very well may be required to undergo training before resuming active duty. It would be extremely ironic for an air carrier to suffer further delays in restoring operations due to the need to retrain returning strikers for flight duty, while permanent replacements who are near completion of their training are discharged to make room for the strikers.

## CONCLUSION

For the foregoing reasons, the Association and the Committee respectfully submit that this case presents a substantial federal question for this Court's review, that the decision below conflicts with this Court's and other circuit courts' authority and that, accordingly, this Court should grant the petition for writ of certiorari.[19]

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Respectfully submitted,

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[19]Because the decision below presents important issues concerning the administration of the RLA, and because Eastern's unsecured creditors include the Pension Benefit Guaranty Corporation, the Association and the Committee respectfully suggest that the views of the Solicitor General should be requested. The Solicitor General has participated as *amicus curiae* in other cases presenting issues of an employer's right to self-help in the airline industry. *E.g., Trans World Airlines, Inc. v. Flight Attendants*, 489 U.S. 426, 428 (1989).